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IN THE

Supreme Court of the United States

October Term, 1961

No. 376

FIVE BORO CONSTRUCTION CORPORATION,

—against—

ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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It is the purpose of t is Reply Brief to demonstrate the failure of the Respond t to touch upon the crucial ques- tions raised in the Peti on for a Writ of Certiorari, and upon the conflict betwe the Circuits on those questions.

As correctly indicate by Respondent, the main thrust of the Petition is (1) th construction of facilities for the national defense is not overed by the Fair Labor Stand- ards Act and (2) even f it were, the construction here involved was too remot rom the finished product to bring the work within the ch nnels of commerce; although we believe our Point II, sug sting that the decision below runs counter to applicable t ritorial law, is also meritorious.

The cases cited by Petitioner in its Petition (Petrs. p. 21) which clearly develop the conflict between the Circuits on the first question, i.e., *Spencer* v. *Porter*, 174 F. (2d) 731; *Cooper* v. *Rust Engineering Co.*, 187 F. (2d) 732; *Mitchell* v. *J. G. Watts Construction Co. et al.*, 15 W. H. 112, —— F. Supp. —— (D. C. D. Ore. 1961) on the one hand, and the Court of Appeals for the First Circuit, on the other, have nevertheless gone untouched by Respondent's hands.

There is an attempt to brush aside the language of this Court in *Mitchell* v. *H. B. Zachry*, to the effect that

> "The combination of the remoteness of this construction from production, and the absence of a dedication of the completed facilities either exclusively or primarily to production, persuades us that the activity is not 'closely related' or 'directly essential' to production for commerce," 362 U. S. 310 at 321,

on the ground that in *Zachry*, as stated in the opinion, the construction was of a dam which even when completed would be neither a "facility of commerce" nor a facility for the production of goods for commerce, but would only ***support*** production of goods for commerce.

If construction of a dam—the purpose of which is to preserve water for industrial and commercial use and for the water we drink—is not commerce within the meaning of the Fair Labor Standards Act, surely the Government will not contend that the construction of a facility to guard and protect our sacred heritage, our cherished liberty and the freedom of the very air we breathe, is commerce within the Act!

Finally, there are cited in the closing paragraph of Respondent's Memorandum five cases which, even upon Respondent's brief analysis appear to be altogether askew from the issues here involved. They all involved construc-

tion of highly commercialized facilities—radio and television, airports, causeways and highways.

Perhaps the most telling proof of the seriousness of the conflict between the circuits, upon which the Respondent's brief has conspicuously failed to touch, is Judge East's language in the *Watts* case, set forth in the Appendix to our main brief, at page 19a:

> "Applicability of the FLSA to employees engaged in construction generally (and construction of facilities of war or national defense in particular) has been a fertile area of litigation. Any attempt completely to harmonize the many decisions concerning coverage by the Acts is virtually certain to end in less than total success."

Respondent presents no reason why such a state of affairs should have to continue.

The necessity for defense construction is even at this writing a dire one and and one which unfortunately looms larger over the horizon with the twilight of every passing day.

In this state of affairs, we believe certiorari and the full exploration of the issues by this Court, with final resolution and determination of the conflict between the circuits, is warranted.

Dated: New York, N. Y.
October 10, 1961

Respectfully submitted,

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